

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

IN RE: : CASE NO. G03-20953-REB

RICHARD M. STEWART and
DIXIE STEWART,

Debtors.

ALBERT F. NASUTI, Chapter 7 Trustee,

Plaintiff,

v.

RICHARD M. STEWART, DIXIE STEWART;
NEW CENTURY MORTGAGE CORPORATION;
U.S. BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR THE REGISTERED HOLDERS
OF NEW CENTURY HOME EQUITY LOAN
TRUST 2002-A, ASSET BACKED PASS
THROUGH CERTIFICATES, SERIES 2002-A;
WILLIAM M. FLATAU BY AND ONLY IN HIS
CAPACITY AS CHAPTER 7 BANKRUPTCY
TRUSTEE FOR THE ESTATE OF JOHN
BENJAMIN STEWART, JR.; GEORGIA
DEPARTMENT OF REVENUE; UNITED
STATES OF AMERICA, BY AND THROUGH
ITS AGENCY THE INTERNAL REVENUE
SERVICE; and NATIONAL CITY BANK, AS
TRUSTEE FOR NEW CENTURY HOME
EQUITY LOAN AND TRUST, SERIES 2002-1
ASSET BACKED PASS-THROUGH
CERTIFICATES SERIES 2002-1 BY OCWEN
FEDERAL BANK, FSB, ITS SERVICING AGENT,;

Defendants.

ADVERSARY PROCEEDING
NO. 04-2051

CHAPTER 7

JUDGE BRIZENDINE

**ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Before the Court is the motion of Plaintiff-Trustee for summary judgment on his complaint herein seeking a determination regarding the extent and priority of various liens, the several responses and replies of Defendants and Plaintiff thereto, and briefs in support. Upon review of the record and applicable law, the Court concludes that Plaintiff's motion should be granted in part.

It appears that the Plaintiff currently holds the approximate sum of \$350,000.00 in the bankruptcy estate representing the proceeds from the sale of certain real property in which various liens are asserted by the United States, the Georgia Department of Revenue, and William M. Flatau by and only in his capacity as Chapter 7 Bankruptcy Trustee for the Estate of John B. Stewart, Jr. Given the total amount of the liens, however, there are insufficient monies from which to satisfy all liens in full. Hence, the question for decision herein concerns the relative priority of the liens, which would then allow the Trustee of this estate to distribute the funds in question according to the lien priorities until the funds are exhausted. It is generally agreed that the liens in question may be charted as follows, at least in terms of recording and/or assessment dates:

Lien Claimant	Face Amount of Lien	Recording/Assessment Date
Internal Revenue Service	\$66,907.44	9-22-97 (Assessment)
William M. Flatau, by and only in his capacity as Chapter 7 Bankruptcy Trustee for the Estate of John B. Stewart, Jr.	\$55,224.18 ¹	4-22-98 (Recording)

¹ Richard M. Stewart and Dixie Stewart filed a cross-motion for summary judgment, contending that they should be given credit by Flatau for the sum of \$64,000.00 paid on the subject judgment lien which totaled \$130,501.08. Based on his response, Flatau does not appear to contest this position. There does seem to be some discrepancy, however, between Flatau's figure as shown above and the arithmetic of the Court which produces a balance of \$66,501.08. To the extent there is any remaining dispute concerning this credit or the amount of the balance presently due on the judgment, the parties should advise the Court and the Court will schedule a telephonic status conference to address these dispute(s).

Internal Revenue Service	\$32,443.28	9-21-97 (Assessment)
Internal Revenue Service	\$38,342.49	9-20-99 (Assessment)
Internal Revenue Service	\$22,151.94	5-29-00 (Assessment)
Internal Revenue Service	\$41,988.10	9-17-01 (Assessment)
Ga. Dep't of Revenue	\$23,667.98	6-26-02 (Recording)
Internal Revenue Service	\$38,480.49	9-16-02 (Assessment)
Internal Revenue Service	\$11,673.57	12-16-02 (Assessment)
Ga. Dep't of Revenue	\$11,070.00	1-06-03 (Recording)
Ga. Dep't of Revenue	\$6,560.44	1-16-03 (Recording)
Ga. Dep't of Revenue	\$6,212.84	3-10-03 (Recording)
Ga. Dep't of Revenue	\$20,294.90	3-19-03 (Recording)

As seen above, William M. Flatau by and only in his capacity as Chapter 7 Bankruptcy Trustee for the Estate of John B. Stewart, Jr., asserts a judgment lien recorded on April 22, 1998. Based upon federal and state law and in accordance with *United States v. City of New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954), and *Tuggle v. Internal Revenue Service (In re Tuggle)*, 30 B.R. 718 (Bankr. N.D. Ga. 1983), the Court concludes that, although the Flatau judgment, with the exception of the 9-22-97 assessment by the United States, precedes the remaining lien claims of the United States and the Georgia Department of Revenue in terms of filing date, the Georgia Department of Revenue steps into the position of the Flatau lien and receives payment up to the amount of the outstanding balance of the Flatau judgment toward the satisfaction of its liens even though these liens postdate the recording of the Flatau judgment.

Therefore, the order of payment shall be as follows regarding the above lien claimants:

1. Internal Revenue Service - balance of claim by reason of assessment dated 9-22-97, plus accrued

interest, penalties, and other charges as provided by law;

2. Georgia Department of Revenue - per this Court's ruling herein for the satisfaction of the several lien claims (in the order of their filing) up to the full amount of the lien claim of William M. Flatau, by and only in his capacity as Chapter 7 Bankruptcy Trustee for the Estate of John B. Stewart, Jr., to include accrued interest, penalties, and other charges due on the judgment as provided by law;²

3. Internal Revenue Service - balance of claim by reason of assessment dated 9-21-98, plus accrued interest, penalties, and other charges as provided by law;

4. Internal Revenue Service - balance of claim by reason of assessment dated 9-20-99, plus accrued interest, penalties, and other charges as provided by law;

5. Internal Revenue Service - balance of claim by reason of assessment dated 5-29-00, plus accrued interest, penalties, and other charges as provided by law; and

6. Internal Revenue Service - balance of claim by reason of assessment dated 9-17-01, plus accrued interest, penalties, and other charges as provided by law.

It appears to the Court, given the sums listed in the chart above plus interest, penalties, and other possible charges that are not shown, that there will be no funds remaining for further payment after paying the liens enumerated above to the extent of available funds. In the event funds do remain for distribution, the next issue to be decided, in the Court's opinion, concerns whether William M. Flatau, by and only in his capacity as Chapter 7 Bankruptcy Trustee for the Estate of John B. Stewart, Jr., would be subrogated to the claim position of the Georgia Department of Revenue by virtue of its lien recorded on 6-26-02, which would be the first lien of the Georgia

² Since the total amount of the Georgia Department of Revenue liens exceeds the Flatau judgment lien, the Georgia Department of Revenue will receive an amount equal to the entire outstanding balance of Flatau's judgment.

Department of Revenue paid from the monies, absent this Court's ruling herein, that would have been paid on the judgment now held by Flatau.³

Based upon the foregoing analysis, it is

ORDERED that Plaintiff-Trustee's motion for summary judgment be, and hereby is, **granted in part** as reasoned above and the Plaintiff-Trustee is authorized to distribute the funds in question in accordance with the relative priorities set forth herein.

The Clerk is directed to serve a copy of this Order upon Plaintiff's counsel, Debtors' counsel, counsel for William Flatau, the United States, the Georgia Department of Revenue, the U.S. Trustee, and all other parties identified in pleadings related to this matter.

IT IS SO ORDERED.

At Atlanta, Georgia this _____ day of May, 2005.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

³ The parties are directed to notify the Court if a decision on this issue becomes necessary. Upon such notification, the Court will conduct a status conference via telephone for purposes of establishing a briefing schedule with respect to this issue or any other dispute regarding the amount presently due on any of the liens in question.